

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 9, 2004

IN RE:

PETITION OF ON-SITE SYSTEMS, INC.)
TO AMEND ITS CERTIFICATE OF)
CONVENIENCE AND NECESSITY)

DOCKET NO.
03-00329

ORDER DENYING MOTION TO DISMISS EAST SEVIER COUNTY UTILITY
DISTRICT AS AN INTERVENOR

This matter is before the Hearing Officer on the *Motion to Dismiss East Sevier County Utility District as an Intervenor* (“*Motion to Dismiss*” or “*Motion*”) filed by Tennessee Wastewater Systems, Inc. (“Tennessee Wastewater” or “the Company”).

I. Background

This docket began with the May 9, 2003 petition (“*Petition*”) of Tennessee Wastewater (then operating under the name On-Site Systems, Inc.) to amend its certificate of convenience and necessity to expand its service area to include the unincorporated areas of Sevier County except for the area currently served by the East Sevier County Utility District (“the Utility District”) and those areas within the city limits and planned growth areas of the municipalities of Sevierville, Pigeon Forge (“Pigeon Forge” or “the City”), Gatlinburg and Pittman Center. On September 24, 2003 the Company submitted a filing to further amend its *Petition* to exclude two areas located on Wears Valley Road in Sevierville presently served by Integrated Resources Management Utility, Inc. The *Petition* was unanimously approved by the voting panel assigned

to this docket at the October 21, 2003 Authority Conference.¹

On February 11, 2004 the Company filed another proposed amendment to the *Petition* seeking to include the planned growth area of Pigeon Forge within its service area. The Company's February 11, 2004 filing was assigned Docket No. 04-00045. The Utility District filed its *Petition to Intervene* in Docket No. 04-00045 on March 15, 2004. The City filed its *Petition to Intervene and Motion to Continue* in Docket No. 04-00045 on March 19, 2004. In an order entered on May 13, 2004 the voting panel assigned to Docket No. 04-00045 voted unanimously to grant the interventions of the Utility District and the City in Docket No. 04-00045 on March 22, 2004.²

On April 7, 2004 the Utility District filed its *Petition for Reconsideration, Intervention, and/or for a Declaratory Order* in this docket. The Company filed its *Objection of On-Site Systems, Inc to Petition for Reconsideration, Intervention and/or for a Declaratory Order of East Sevier County Utility District* ("Objection") in this docket on April 19, 2004. The Utility District filed its *Motion for Leave to File Reply* to the *Objection* in this docket on April 22, 2004. At a regularly scheduled Authority conference held on April 26, 2004 the voting panel assigned to this docket voted unanimously to allow the Utility District to intervene in Docket 03-00329 and to request the Chairman of the Authority to consolidate Docket Nos. 03-00329 and 04-00045. Docket No. 04-00045 was thereafter administratively consolidated into Docket No. 03-00329.

Tennessee Wastewater filed the *Motion to Dismiss* on May 19, 2004. A duly noticed status conference was held on May 20, 2004 from which a procedural schedule was entered on May 25, 2004 requiring the filing of responses to the *Motion to Dismiss* on or before June 15, 2004 and

¹ *Order Approving Petition of On-Site Systems, Inc to Amend Its Certificate of Public Convenience and Necessity* (March 24, 2004).

² *Order Granting Petitions to Intervene and Appointing a Hearing Officer* (May 13, 2004).

setting a hearing on the *Motion* on June 29, 2004.

On June 2, 2004 the Company filed its *Supplemental Memorandum of Law in Support of Motion to Dismiss East Sevier County Utility District as an Intervenor* (“*Supplemental Memorandum*”). On June 15, 2004 the East Sevier County Utility District (“the Utility District”) filed its *Memorandum of Law and Response to the Motion by Tennessee Wastewater Systems, Inc. to Dismiss East Sevier County Utility District as an Intervenor* (“*Response*”). The Company filed its *Reply of Tennessee Wastewater Systems, Inc. to Memorandum of Law and Response of East Sevier County Utility District to Motion to Dismiss* (“*Reply*”) on June 24, 2004.

Pursuant to the May 25, 2004 scheduling order, a hearing was held on June 29, 2004 (“the Hearing”) regarding the *Motion to Dismiss*. All parties to this docket were represented at the Hearing and were afforded an opportunity to be heard. The Hearing Officer heard argument from counsel for the Utility District and the Company—the City offered some commentary but declined to take a position regarding the *Motion*.³

II. Issue Presented for Decision

In its *Motion to Dismiss* Tennessee Wastewater contends that the Utility District was invalidly created, that its corporate existence is therefore void, and that it therefore has no legal interest in this docket. The issue before the Hearing Officer is whether the Hearing Officer should grant the Company’s *Motion to Dismiss* based upon a finding that the Utility District has no legal interest in this proceeding.

III. Positions of the Parties

a. Tennessee Wastewater

The Company alleges that the District was not legally created and therefore has no right to

³ Transcript of Proceedings, pp 15, 39 (June 29, 2004)

assert an interest in this docket.⁴ The Company points specifically to the requirements of Tenn. Code Ann. § 7-82-202(a)(2) which provides that the county mayor's order creating a utility district must include language "stating the service or services which the district shall be authorized to furnish."⁵ The *Motion to Dismiss* states:

The order entered on June 7, 1973 by the County Judge of Sevier County which created the East Sevier County Utility District does *not* state the service or services the District was authorized to furnish as required by T.C.A. § 7-82-202(a)(2). . . . When a municipal corporation fails to follow statutory requirements for its creation, the creation of the municipal corporation is void. *Woodbury v. Brown*, 101 Tenn. 707, 50 S.W. 743 (1899). The District is a municipal corporation. T.C.A. § 7-82-301.⁶

The *Motion to Dismiss* states further that "since the District's creation is void, it has no legal rights which can be affected in this proceeding."⁷ The Company asserts in its *Supplemental Memorandum* that the void status of the Utility District leaves it without power to provide sewer service in the Company's proposed service area, without power to contract with persons seeking sewer service in the Company's proposed service area, and therefore without standing to maintain its intervention in this docket.⁸ The Company states in its *Reply* that the Authority does not have the jurisdiction to determine whether the Utility District was validly created but insists that the Authority "must decide whether the District can legally provide sewer service within the areas sought to be served."⁹ The Company states in its *Reply* that "defective creation of the District cannot be corrected by an implied recognition of the District by courts or administrative agencies" and that the issue of the validity of the Utility District's creation was not an issue in the cases cited by the Utility District in its *Response* as demonstrating its recognition as a valid

⁴ *Motion to Dismiss*, p 1 (May 19, 2004). See also *Supplemental Memorandum*, p 1 (June 2, 2004)

⁵ *Motion to Dismiss*, p. 2 (May 19, 2004).

⁶ *Motion to Dismiss*, p. 2 (May 19, 2004)

⁷ *Motion to Dismiss*, p 3 (May 19, 2004)

⁸ *Supplemental Memorandum*, p 4 (June 2, 2004)

⁹ *Reply*, p. 2 (June 24, 2004)

entity by the courts.¹⁰ The Company asserts in its *Reply* that “if the District is not legally able to provide sewer service and the Authority acts in this matter based upon the assumption it can, potential customers which the Company can serve may be precluded from obtaining sewer service in a timely fashion.”¹¹

At the June 29, 2004 Hearing counsel for the Company reiterated its position that the Utility District does not have authority to provide sewer service under Tennessee law and therefore has no interest in this docket.¹² Counsel for the Company stated that a governmental entity, unlike a private corporation, must follow the statutory steps for its creation and that if it fails to do so its creation is void.¹³ Counsel for the Company reiterated the assertions presented in the *Motion to Dismiss* and the *Supplemental Memorandum* that the Sevier County Mayor’s failure to list the Utility District’s authorized services in the order creating the district rendered the creation of the district void.¹⁴

During the June 29, 2004 Hearing counsel for the Company acknowledged that the Hearing Officer does not have the authority to make a determination as to whether the Utility District was validly created but nevertheless argued that the Hearing Officer should consider the question of the validity of the Utility District’s existence in determining whether the Utility District has an interest in this docket.¹⁵ Counsel for the Company explained this position stating

Let’s say that action is taken in this docket based upon the fact that East Sevier County Utility District can provide sewer service. If they can’t, then a decision has been made in this docket based upon something that doesn’t exist. That’s why that determination needs to be made as to do they really have an interest or not.

Counsel for the Company stated that if the *Petition* is granted the Company would have “a

¹⁰ *Reply*, pp 1-2 (June 24, 2004)

¹¹ *Reply*, pp 2-3 (June 24, 2004)

¹² Transcript of Proceedings, p 4 (June 29, 2004)

¹³ Transcript of Proceedings, p. 7 (June 29, 2004).

¹⁴ Transcript of Proceedings, p. 7 (June 29, 2004)

¹⁵ Transcript of Proceedings, p 9 (June 29, 2004)

prior right to serve in those areas that it gets a certificate for.”¹⁶ Counsel for the Company also suggested that if the *Petition* is granted the Company would rely on the grant of the certificate of convenience and necessity to oppose any future efforts of the Utility District to operate in the service area identified by the *Petition*.¹⁷

b. The Utility District

In its *Response* the Utility District states that it is a viable municipal corporation and that it cannot be dismissed from this docket because the TRA may not make a decision as to the valid creation of the Utility District, that the TRA is not the appropriate forum to resolve such an issue, that the *Woodbury* case cited by the Company in support of the *Motion to Dismiss* is based on a statute inapplicable to the Utility District, and that the Company has no standing to attack the valid creation of the Utility District.¹⁸

The Utility District cites two Tennessee Supreme Court cases and one appearance in the United States Bankruptcy Court for the Eastern District of Tennessee to demonstrate that it has been recognized as a valid utility district by the courts and further states that the District “has always been recognized as a viable utility district by the Utility Management Review Board.”¹⁹

The Utility District states that the Authority does not have jurisdiction over utility districts except as provided for in the Utility District Law of 1937 which is codified at Tenn. Code Ann. § 7-82-101 *et seq.*²⁰ The Utility District relies on Tenn. Code Ann. § 7-82-104(a) which provides that the Tennessee Regulatory Authority does not have jurisdiction over the management and control of any utility district system except as provided for by the Utility District Law of 1937

¹⁶ Transcript of Proceedings, p 29 (June 29, 2004).

¹⁷ Transcript of Proceedings, pp. 29, 31, 40 (June 29, 2004)

¹⁸ *Response*, pp. 1-2 (June 15, 2004).

¹⁹ *Response*, p 2 (June 15, 2004)

²⁰ *Response*, p 3 (June 15, 2004)

and the Wastewater Facilities Act of 1987.²¹ The Utility District states that an Authority determination regarding the validity of the creation of the Utility District would violate Tenn. Code Ann. § 7-82-104(a) because such a determination would amount to the exercise of jurisdiction over the management and control of the Utility District.²²

The Utility District cites the Tennessee Supreme Court case of *City of Fairview v Spears*, 359 S.W.2d 824, 210 Tenn. 404 (1962) in support of its assertion that a municipal corporation is “not subject to attack by a private party when the issue is the valid creation of the corporation” and that attacks on the validity of the creation of the Utility District must be brought in the form of a *quo warranto* action.²³ The Utility District states, “Because Tennessee Wastewater is nothing more than a private citizen, a for-profit corporation, it lacks standing necessary to challenge the valid creation and continued existence of the District.”²⁴

IV. Discussion and Analysis

The *Motion to Dismiss* amounts to a challenge to the standing of the Utility District in this contested case proceeding. Standing in a contested case is established when a petitioner has demonstrated that its legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding. TRA Rule 1220-1-2-.08 regarding interventions provides, “A petition for intervention shall set forth with particularity those facts that demonstrate that the petitioner’s legal rights, duties, privileges, immunities or other legal interests may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law. Intervention may be denied or delayed for failure to provide such specific facts.”

In the Authority’s *Order Granting Petitions to Intervene and Appointing a Hearing Officer*

²¹ Tenn. Code Ann. § 7-82-104

²² *Response*, p 3 (June 15, 2004).

²³ *Response*, pp 7-9 (June 15, 2004).

²⁴ *Response*, p 8 (June 15, 2004)

the voting panel assigned to this docket previously found that the Utility District has demonstrated that its legal interests, rights, privileges and duties may be determined in this proceeding and voted unanimously to allow the Utility District to intervene.²⁵ With its *Motion to Dismiss* the Company necessarily takes the position that, notwithstanding the Authority's previous determination that the Utility District has standing, the Hearing Officer must revisit the issue of whether the Utility District's legal interests, etc. may be determined in this proceeding. The Company's *Motion* attacks the Utility District's standing in this case with the contention that, to the extent the Utility District seeks to offer wastewater treatment services, it is not properly authorized to exercise such powers by law, that it therefore has no legal interests that may or will be determined in this proceeding, and that it therefore does not have standing. Put succinctly the Company has stated that the Utility District has no standing because it seeks to exercise powers not conferred upon it by law.

Tenn. Code Ann. 29-35-101(3)-(4) ("the *Quo Warranto* Statute") states:

An action lies in the name of the state against the person or corporation offending, in the following cases:

(3) When any person acts as a corporation within this state, without being authorized by law;

(4) Or if, being incorporated, they:

(A) Do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation; or

(B) Exercise powers not conferred by law; or

(C) Fail to exercise powers conferred by law and essential to the corporate existence.

The Hearing Officer finds that Tenn. Code Ann. § 29-35-101 *et seq.* is applicable to the Company's *Motion* because the Utility District is a corporation and because the *Motion*

²⁵ *Order Granting Petitions to Intervene and Appointing a Hearing Officer*, p 2 (May 13, 2004)

essentially alleges that any provision of wastewater treatment service would be a corporate exercise of power not conferred by law. The Hearing Officer finds that the *Quo Warranto* Statute applies to the Company's *Motion* and requires that such an action be brought in the name of the state and in a forum with jurisdiction to hear such an action. Pursuant to Tenn. Code Ann. § 7-82-104(a) which provides that the TRA does not have jurisdiction over the management and control of any utility district system the Hearing Officer finds that the TRA is not the validity of the existence of a municipal corporation or the extent of its powers.

The Hearing Officer has reviewed the Tennessee Supreme Court Case of *City of Fairview v Spears*, 359 S.W.2d 824, 210 Tenn. 404 (1962) wherein the Court held that private citizens could not bring an action to have a city's charter declared void and that such action would have to be brought in the name of the state and finds that the holding in the *Fairview* is proper precedent for review of the *Motion*. In rendering its decision, the Court in the *Fairview* case quoted 62 C.J.S. § 32, page 109 as follows:

Where the municipality is at least a de facto corporation, or is acting under the color of law, the validity of its organization and corporate existence can be questioned only by the state in a direct proceeding for that purpose, prosecuted by, or brought through the instrumentality of, the attorney general or such other officer or person as is authorized to invoke the remedy, or by some individual, under authority of the state, who has a special interest which is affected by the existence of the corporation; it cannot be questioned in a collateral proceeding, especially in a suit by or against an individual²⁶

The Company has not cited any Tennessee authority demonstrating that Tenn. Code Ann. § 29-35-101 does not control, that the holding in *City of Fairview v Spears* has been overturned, or that the *Fairview* holding does not apply to the facts presented in this docket. The Authority has previously resolved the issue of whether the Utility District's legal interests *may* be decided in this proceeding. The *Motion to Dismiss* presents no legally sound basis for overturning the Authority's previous decision that the Utility District has standing to intervene in this docket. It

²⁶ *City of Fairview v Spears*, 359 S.W.2d 824, 826, 210 Tenn. 404, 408-409 (1962)

is undisputed the Utility District is a municipal corporation. A motion by a private person in a collateral proceeding seeking to dismiss a municipal corporation as an intervenor solely on the basis that its creation is void or that it is otherwise seeking to exercise powers not conferred by law is precluded from consideration by the Authority pursuant to the *Quo Warranto* Statute and Tenn. Code Ann. § 7-82-104(a).

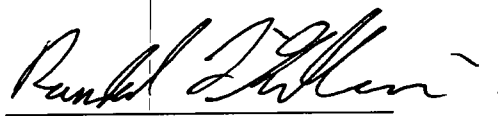
The Hearing Officer declines to consider the Utility District's legal standing in this matter as challenged by the *Motion* because such a consideration would amount to a determination of whether the Utility District's creation is void or a determination of whether the Utility District seeks to exercise powers not conferred upon it by law. To do so would violate the *Quo Warranto* Statute.

V. Conclusion

Based on the foregoing discussion and analysis and the exclusive manner under Tennessee law for bringing an action to challenge the legal status of a municipal corporation, the *Motion to Dismiss* should be denied.

IT IS THEREFORE ORDERED THAT:

The *Motion to Dismiss East Sevier County Utility District as an Intervenor* is denied.



RANDAL L. GILLIAM
AS HEARING OFFICER